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Supreme Court of the United States

OCTOBER TERM 1970

No. 647

LARSEN FORD, INC.,

Petitioner,

against

NANCY GASPERINO, as Administratrix of the Estate of Gregory Gasperino, Deceased,

and

FORD MOTOR COMPANY,

Respondents.

BRIEF FOR RESPONDENT, NANCY GASPERINO, IN OPPOSITION TO PETITION OF LARSEN FORD, INC., FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Introductory Statement	1
Statement of the Case	4
Questions Presented	5
Decisions Below	6
Statutes	7
POINT I—The petition fails to establish sufficient reason for granting a writ of certiorari	9
A. The first question sought to be reviewed seeks an advisory opinion as to New York law	9
B. The second question sought to be reviewed seeks an advisory opinion as to New York law	11
C. The third point sought to be reviewed presents no constitutional or substantial federal question	12
Conclusion	13

CASES CITED

Burns v. Cunard Steamship Company, 404 F. 2d 60 (2nd Cir. 1968)	10, 11
Grunenthal v. Long Island R.R., 393 U. S. 156, 1968	12

PAGE

Rudd-Melikian, Inc. v. Merritt, 282 F. 2d 924, 929 (6th Cir. 1960) 10

Woodhull v. Minot Clinic, 259 F. 2d 676, 678 (8th Cir. 1958) 10

STATUTES

New York State Labor Law

Sections 2(7) and (9) 7, 8, 9, 10

Section 200 .....3, 4, 5, 6, 7, 9, 10

Section 299 .....2, 3, 4, 6, 7, 8, 9, 10

Section 316 .....6, 7, 8, 9

N. Y. Industrial Code Rules 12 and 18 2

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Introductory Statement

This brief is submitted by respondent administratrix (plaintiff in the trial court) in opposition to the petition for certiorari of Larsen Ford, Inc. (defendant in the trial court).

The opinion of the District Court appears at 300 F. Supp. 1182 (Honorable David N. Edelstein, sitting without a jury), and the unanimous affirmance by the Second Circuit Court of Appeals appears at 426 F. 2d 1151.

Federal jurisdiction based upon diversity of citizenship was conceded. The evidence established that plaintiff's decedent, an employee of the Ford Motor Company, died as a result of his exposure to carbon monoxide poisoning in the basement of premises entirely operated and occupied by defendant Larsen Ford, Inc. For a monetary consideration, defendant Larsen had made its premises available to Ford Motor Company. The evidence further showed that Carl Larsen, the president of Larsen Ford, Inc., affirmatively directed the decedent to perform his work in the basement with full knowledge that the basement lacked statutory safety equipment or any other ventilating facilities and that the operation which Gasperino and his fellow workers were required to perform would *necessarily* result in the production of carbon monoxide fumes. Larsen knew that his men had covered the windows of the basement with plastic, thereby decreasing the natural ventilation (311a).* He also personally forbid his men to work in that basement (174a) evidencing his knowledge that it was unsafe. It had, no mechanical ventilation (41a) of the type that Larsen customarily provided for his own men (165a) and he nevertheless directed Gasperino and his fellow mechanics to work in that specific area (173a), which was deceptively safe appearing (op. 31a).

The Trial Court was therefore amply justified in finding that defendant failed to provide decedent with a safe place to work and failed to warn him of the known danger. The evidence affirmatively showed that defendant's plant was unsuited to the use for which it was put and intended by Larsen to be put (170a) by reason of the absence of exhaust systems required by statute (Section 299, New York State Labor Law) by rule (N. Y. Industrial Code Rules 12 and 18) and by Larsen's own custom and usage (165a).

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* Numbers followed by the letter "a" refer to the appendix in the court below.

The complaint herein charged defendant Larsen Ford, Inc. with violation of an absolute liability statute (Section 299 of the New York State Labor Law) and with negligence in violating said statute and in violating Section 200 of the same law which mandates that "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places". Judge Edelstein made specific findings of violation of both sections of the Labor Law. He further held that Section 299 was intended to and did create a cause of action for violation of statute and that defendant's violations of Sections 200 and 299 of the Labor Law were a proximate cause of the decedent's death. He further found that the decedent was not contributorily negligent.

It is noted, respectfully, that neither the defendant, Larsen, nor the third party defendant, Ford Motor Company, offered any medical evidence whatever to controvert the cause of death. Nor did they offer any evidence controverting the financial matters testified to by plaintiff's witnesses. Plaintiff's evidence established that the decedent had been recently promoted, was about to be again promoted, had recently completed numerous company courses for advancement purposes, and that decedent had moved up from the sales to the executive level. The court itemized with great specificity its computation of damages in the sum of $215,899.00. Pre-judgment interest under the New York Decedent's Estate Law was added thereto as required by statute, and judgment was entered in the total sum of $280,669.00. Said judgment was entered solely against the defendant Larsen Ford, and its third party claim for indemnity was dismissed by reason of the trial court's finding, affirmed by the Second Circuit, that Larsen "was the active tortfeasor if those words have any meaning at all." 300 F. Supp. 1191; 426 F. 2d 1154, fn. 5.

On appeal, the judgment was affirmed by the Second Circuit Court of Appeals in the unanimous opinion by Judge Danaher (sitting by designation) and petitioner's motions for rehearing and rehearing en banc were denied.

In its opinion, the Second Circuit affirmed all of the findings of the District Court with the sole exception of the applicability of Section 299 of the New York Labor Law to an employee of other than the owner or operator of the premises. In that respect the Court noted that it was unable to find a New York decision making such application and that it was unnecessary to further consider Judge Edelstein's "appealing treatment of this aspect of the case" for the reason that the judgment had to be affirmed under Section 200 of the New York Labor Law. In its petition for certiorari, defendant Larsen has not asked this Court to review or consider Judge Edelstein's finding in favor of the plaintiff under Section 299, although that finding stands unreversed by the Second Circuit and provides an independent state ground which fully supports the judgment herein.

Statement of the Case

On April 3, 1964, decedent was advised that a special shipment of Mustang automobiles was being sent by the Ford Motor Company to Larsen Ford, Inc. At that time, the Mustang automobile had not yet been exposed to public view. Gasperino and his co-workers were instructed to remove the Mustangs from the delivery trucks and to perform make ready work upon them in preparation for a public exhibition of these cars. Carl Larsen, president of Larsen Ford, Inc., directed that this work be performed in the basement of Larsen's premises. This basement area contained no mechanical ventilation of any kind, and Larsen had specifically forbidden its own employees to work in that area by reason of the danger of carbon monoxide and his knowledge of the lack of ventilation.

Larsen further knew the purpose and nature of the work, to be performed by Gasperino and his co-workers, which necessarily involved the running of the engines for the purpose of checking fluid levels. In addition, Larsen knew that by reason of the large number of cars involved, it would be necessary to move the cars about in order to work on them. Larsen had received a monetary consideration for the use of his premises. Larsen gave no warning of any kind to Gasperino or his co-workers of the inherent danger of which Larsen was aware and which Judge Edelstein found to be a "deceptively dangerous condition". Larsen also knew that certain of his employees had covered the windows of the basement with plastic to keep out the cold.

The uncontroverted medical proof conclusively established that while working in the basement on April 6, 1964, decedent and two other employees were stricken by carbon monoxide fumes. The other two employees recovered. Gasperino, as a proximate result of his exposure to excessive carbon monoxide, suffered a coronary thrombosis from which he died. The medical evidence also established that although the decedent had a pre-existing unknown atherosclerotic condition, this condition was "well compensated" and in no way prevented him from performing his work. It was only the extreme exposure to carbon monoxide that caused his death.

Questions Presented

(1) Whether the Courts below correctly interpreted the concededly applicable state law (Section 200 of the N. Y. Labor Law)?

(2) Whether the Courts below correctly interpreted the concededly applicable state law of indemnity?

(3) Whether the Courts below awarded damages in an amount which denies petitioner equal protection?

Decisions Below

The District Court in its opinion, which appears at pages 37 through 55 of the petition herein, specifically found:

(1) That the premises "in which the decedent was working was a workroom in a factory within the meaning of Section 299" of the New York Labor Law and that the decedent was a person within the class intended to be protected by said statute and Section 316 of the New York Labor Law and that "defendant Larsen Ford violated Section 299 by failing to provide mechanical ventilation as required therein" (Petition, pp. 42-43).

(2) That Larsen also failed to provide the decedent with a safe place to work, as mandated by Section 200 of the New York Labor Law (Petition, pp. 49-50).

(3) That the aforesaid violations of Sections 299 and 200 of the New York Labor Law were proximate causes of the decedent's death (Petition, pp. 40-41).

(4) The premises presented an illusion of a safe place in which to work, when, in fact, it was not safe at all. Its appearance was so deceiving as to be able to mask successfully a very dangerous condition. The garage's deceptively dangerous condition could hardly have been realized in the exercise of ordinary prudence and discretion. It is indeed doubtful that the danger of carbon monoxide poisoning became apparent until Gasperino and two of his coworkers were stricken, and perhaps not even then. In sum, what the record reveals to this Court is that Gasperino asserted that degree of care which others of his type and position would ordinarily exercise under comparable conditions and circumstances (Petition, p. 48).

(5) That itemized damages as computed under applicable New York Law amounted to $215,899.00; and

(6) That the cross-claim for indemnity had to be dismissed by reason of Larsen's active negligence.

The Second Circuit in its opinion (pp. 30-36 of the petition) unanimously affirmed all of the above findings with the exception of the applicability of Section 299 to decedent, noting that it was unnecessary to pass on Judge Edelstein's "appealing treatment of this aspect of the case" because of its affirmance upon the alternative ground. Thus, the Court, in affirming under Section 200 of the Labor Law, was acutely aware of the group to whom that statute applied. It agreed unanimously with Judge Edelstein's conclusion that decedent was entitled to the benefits thereof. The Circuit Court also carefully reviewed the contention that damages were excessive and affirmed in the precise amount of the District Court's award.

Statutes

The pertinent statutes are Sections 200, 299 and 316 of the New York Labor Law, and also Sections 2(7) and (9) of the New York Labor Law.

Section 200 of the New York Labor Law, insofar as it is relevant in the case at bar, provides:

> "1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. * * *"

The relevant portions of Section 299 of the New York Labor Law, reads as follows:

> "1. Every work room in a factory shall be provided with proper and sufficient means of ventilation,

natural or mechanical or both, as may be necessary, * * *.

"2. All machinery creating dust or impurities in quantities tending to injure the health of employees shall be equipped with proper hoods and pipes connected to an exhaust fan of sufficient capacity and power to remove such dusts or impurities; such fan shall be kept running constantly while such machinery is in use. * * *

"3. If dust, gases, fumes, vapors, fibers or other impurities are generated or released in the course of the business carried on in any workroom of a factory, in quantities tending to injure the health of the employees, suction devices shall be provided which shall remove such impurities from the workroom, at their point of origin where practicable, by means of proper hoods connected to conduits and exhaust fans. Such fans shall be kept running constantly while the impurities are being generated or released."

Subdivision 1 of Section 316 of the New York Labor Law provides:

"1. Except as in this article otherwise provided, the person operating a factory, whether as owner or lessee of the whole or a part of the building in which the same is situated or otherwise, shall be responsible for the observance of the provisions of this article, anything in any lease or agreement to the contrary notwithstanding."

Section 2 of the New York Labor Law, which is entitled "Definitions", provides as follows in subdivisions (7) and (9) thereof:

"Wherever used in this chapter

* * *

7. 'Employed' includes permitted or suffered to work.

* * *

9. 'Factory' includes a mill, workshop, or other manufacturing establishment, where one or more persons are employed at manufacturing, including making, altering, repairing, finishing, canning, cleaning or laundering any article or thing in whole or in part, and includes all buildings, sheds, structures or other places used for or in connection therewith [with certain enumerated exceptions which are not relevant in the case at bar] * * *"

POINT I

The petition fails to establish sufficient reason for granting a writ of certiorari.

A. The first question sought to be reviewed seeks an advisory opinion as to New York law.

Larsen urges that the Court of Appeals wrongly applied Section 200 of the New York Labor Law. It does not urge that the court applied the law of the wrong jurisdiction. It does not urge that the district court or the Court of Appeals failed to follow any federal rule as to applicable law, but merely that the interpretation of New York law reached by the trial court and concurred in by the Circuit Court of Appeals is in error as *a matter of New York State law*. It is thus apparent that the question sought to be presented for review would require this Court to render an advisory opinion as to certain decided New York cases which would in no way be binding upon the New York Court of Appeals. That Court could thereafter render a contrary opinion on the same questtion which would be binding on all of the courts of the State of New York and, indeed, upon the Second Circuit Court of Appeals and even upon this Court. It is respectfully sug-

gested that this Court has in the past refrained as a matter of policy from issuing advisory opinions because of the non-binding effect of such opinions and out of a proper deference to the Federal-State relationship.

Moreover, it is respectfully noted that the objection made to the interpretation of New York State law in the court below is that Section 200 does not apply to a person other than an employee of the owner or operator of the premises. The statute, as set forth above, specifically makes such section applicable "to provide reasonable and adequate protection to the lives, health and safety *of all persons employed therein or lawfully frequenting such places*". By reason of Section 2(7) set forth above the same law defines employed as "permitted or suffered to work". There is no question in this case that decedent was permitted to work on Larsen's premises and there is also no question that he was lawfully frequenting the same. Thus, it is apparent on its face that the statute refutes the contention urged.

The federal circuit courts have long accorded great respect to the opinion of a trial judge as to State law. *Woodhull* v. *Minot Clinic*, 259 F. 2d 676, 678 (8th Cir. 1958); *Rudd-Melikian, Inc.* v. *Merritt*, 282 F. 2d 924, 929 (6th Cir. 1960). *A fortiori*, it would seem logical that this Court should afford great weight to such a trial court's determination, reinforced by the unanimous opinion of the federal circuit court citing in that state.

In the instant case, footnote 5 of the Circuit Court's opinion demonstrates a keen awareness on the part of the Circuit Court of the persons protected by each of the statutes involved, and that Court's recognition that while petitioner's argument may have some merit as to New York Labor Law Section 299, it does not have similar merit as to Section 200 of the same law. The authorities cited in *Burns* v. *Cunard Steamship Company*, 404 F. 2d

60 (2nd Cir. 1968), *cert. denied*, 393 U. S. 1117 (1969), cited by the Second Circuit in this case, reflect the correct view of New York law applicable both to this point and to the indemnity argument advanced by petitioner.

All of the cases cited by petitioner relate to defects in a contractor's apparatus or method of performing his work. In this case the evidence conclusively established that the Ford employees performed their work normally, without defect as to method or equipment. The evidence also showed that the plant itself (belonging to defendant Larsen Ford, Inc.) was defective for the purpose for which Larsen intended it to be used by reason of the absence of statutorily mandated ventilating equipment and by reason of its plastic covered windows which kept out natural ventilation. No evidence was introduced, and none is referred to or cited by petitioner, which could have arguably controverted the factual showing upon which the legal conclusions of the courts below were based. In this situation, it is submitted the record does not even present for review the question upon which petitioner seeks an advisory opinion from this court.

B. The second question sought to be reviewed seeks an advisory opinion as to New York law.

While the Administratrix has no direct interest in the question of indemnity, we do respectfully point out to the court that here too petitioner is seeking an advisory opinion of this Court as to New York law. This opinion, as in the case of the first question presented would not be binding on the New York Court of Appeals whose subsequent decision would, under established federal law, be binding on the federal courts. We respectfully submit that federal-state comity and the absence of any federal question (since the law of the correct jurisdiction has been applied) mandate a denial of the writ upon this ground as well.

C. The third point sought to be reviewed presents no constitutional or substantial federal question.

Petitioner here, as in the Circuit Court, advances a lengthy argument concerning damages based upon cases dealing with percentages of decedent's income allowed depending upon the number and nature of the surviving relatives. We respectfully urge that this argument has in no way been connected with the facts established in the record in the instant case. We take no position with regard to the viability of these cases since it is our contention that where, as here, the record abundantly evidences a definite method of utilization of earnings by the decedent over an extended period of time, the district judge is permitted to apply the considerations specified by this court in *Gruenthal* v. *Long Island R. R.*, 393 U. S. 156, 1968, in computing damages based upon the facts established in the record. The Circuit Court, agreeing with this view, itself "examined the record evidence involved in the findings of the trial judge who had carefully detailed the respective elements on which he based the award", 426 F. 2d at 1154. It concluded "After a fair appraisal of the claims advanced by Larsen, measured against the findings not without support in the record, we are satisfied the award should be permitted to stand", Ibid.

The findings were based upon an extensive record which included evidence showing that the decedent in his employment with the Ford Motor Company had been promoted a short time after commencing employment and was about to be promoted again. He had moved from the sales to the executive level and was conceded to be an extremely highly thought of employee. By reason of his expense account, his personal expenditures were extremely modest and his family benefited more substantially than in the average case from his earnings. This was established by evidence of what was actually done with his income over a period of many years preceding his death.

There was abundant evidence that the decedent was an unusually devoted father, who taught both his sons his profession and who spent numerous hours with his daughter and with the family as a whole. Indeed, Mrs. Gasperino described the family as one which did not go out a great deal, their chief recreation being a family visit which lasted virtually an entire Sunday.

These and other facts with which the record is repleat were taken into account in both the district and circuit courts in accord with the various cases cited in the opinion of the Circuit Court. We respectfully submit that even were this award somewhat more generous than in other cases, that difference is based upon the evidence in this record and in any event does not present a constitutional or substantial federal question. Again, it is the New York State law of damages in this New York death action, tried in the federal court only by reason of diversity, which is controlling. We note respectfully that the petitioner cites not a single New York case alleged to conflict with the interpretation of New York Decedents Estate Law, Section 132, which was utilized in the courts below.

CONCLUSION

For the reasons above stated it is respectfully submitted that the petition herein should be denied in its entirety.

Respectfully submitted

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